Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Introduction of New Advanced Mobile and Fixed Terrestrial Services; Use of Frequencies Below 3 GHz	)	ET Docket Nos. 00-258 and 95-18; IB Docket No. 99-81
	)	
Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum for Terrestrial Wireless Use	)	RM-

To: The Commission

PETITION FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

Pursuant to Section 1.429 of the Commission's rules, the Cellular Telecommunications & Internet Association ("CTIA") petitions the Commission to reconsider its denial of CTIA's petition for rulemaking insofar as it requested a reallocation of the entire 2 GHz Mobile Satellite-Service ("MSS") band.[1] The Commission has neither followed its own regulations which require that the petition be placed on public notice, nor clearly articulated any basis for the denial. To the extent the Commission intended the recent MSS licensing decisions by the International Bureau ("the Bureau") to form some basis for the denial, that reliance is misplaced. Those licensing decisions could only occur after full consideration of CTIA's petition because that filing dealt with the threshold issue of whether the spectrum should be reallocated for other uses and auctioned. Finally, had the CTIA petition been properly considered, the factual predicate for moving ahead with licensing would have been non-existent.

[1] 47 C.F.R. § 1.429; *see* Petition for Rulemaking of the Cellular Telecommunications & Internet Association (filed May 18, 2001) ("CTIA Petition").

DISCUSSION

On May 18, 2001, CTIA filed a petition for rulemaking to reallocate underutilized MSS spectrum in the 2 GHz band, citing evidence that MSS is not economically viable as an industry and emphasizing the dire need for Commercial Mobile Radio Service ("CMRS") spectrum. CTIA requested the Commission to reallocate the spectrum and make it available at auction for more efficient competing uses for which there is a clear immediate need, *e.g.*, terrestrial mobile wireless services. CTIA urged the Commission to defer licensing 2 GHz MSS systems until it had conducted a rulemaking pursuant to CTIA's petition, thereby ensuring that the spectrum was put to its most efficient use (consistent with the Commission's "highest and best use" spectrum policy). CTIA specifically noted that license deferral was necessary to allow the Commission to implement reallocation in a manner that treats all potential licensees – not just MSS applicants – fairly and equally.[2]

Instead, the Bureau granted the applications prior to addressing CTIA's petition on July 17, 2001. One month later, on August 16, 2001, a timely Application for Review was filed challenging each of the eight 2 GHz MSS licensing orders.[3] That filing seeks vacation of the license grants and requests a freeze on further processing pending final action on the CTIA petition and completion of rulemakings addressing reallocation and the services to be provided over the band.[4] Several days after the Application for Review was filed, the Commission denied

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[2] CTIA reiterated the importance of license deferral in subsequent *ex parte* filings addressing the 2 GHz MSS applications. *See, e.g.*, July 12, 2001 CTIA *ex parte* in IB Docket 99-81 and ET Docket 00-258, appended to *ex parte* letter filed July 16, 2001.

[3] *See* Application for Review of AT&T Wireless Services, Inc., Cellco Partnership d/b/a Verizon Wireless and Cingular Wireless LLC in DA 01-1635 *et al*. (filed Aug. 16, 2001) ("Application for Review").

[4] *Id*. at 8; *see Introduction of New Advanced Mobile and Fixed Terrestrial Wireless Services; Use of Frequencies Below 3G*, ET Docket Nos. 00-258 and 95-18 and IB Docket No.
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CTIA's petition in substantive part in its *Advanced Services Further Notice*. The denial of CTIA's petition not only occurs in the *Advanced Services Further Notice* rather than the *Advanced Services MO&O*, but also merely states that such action was consistent with the Bureau's recent action granting 2 GHz MSS licenses and the public interest.[5]

The FCC has not seriously considered the CTIA petition and whether maintaining the entire 2 GHz MSS allocation is rational in light of changed circumstances in the MSS and CMRS industries. Whether the approach violates the auction statute, 47 U.S.C. § 309(j), also was not considered. Action in response to the *Advanced Services Further Notice* concerning 2 GHz MSS spectrum and the companion *Flexible Use Notice* is premature because it is predicated upon what the FCC decides here with regard to the availability of spectrum.

I. THE COMMISSION FAILED TO FOLLOW ITS OWN REGULATIONS BY NOT PLACING THE PETITION ON PUBLIC NOTICE.

The FCC's rules specifically require that "*[a]ll* petitions for rule making . . . meeting the requirements of §1.401 will be given a file number and, promptly thereafter, a 'Public Notice' will be issued," giving any interested person an opportunity to comment.[6] The Commission cannot take action on the petition until after the deadline for filing replies.[7] Here, the FCC's

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99-81, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 01-224 (rel. Aug. 20, 2001), *summarized*, 66 Fed. Reg. 47618 (Sept. 13, 2001) ("*Advanced Services MO&O*" or "*Advanced Services Further Notice*"); *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, IB Docket No. 01-185 & ET Docket No. 95-18, *Notice of Proposed Rulemaking*, FCC 01-225 (rel. Aug. 17, 2001), *summarized*, 66 Fed. Reg. 47621 (Sept. 13, 2001) ("*Flexible Use Notice*").

[5] *See* 66 Fed. Reg. at 47619 ("The FNPRM . . . denies the [CTIA] petition insofar as it requests reallocation of the entire 2 GHz MSS band and a delay in authorizing 2 GHz MSS systems.").

[6] 47 C.F.R. §§ 1.403 (emphasis added), 1.405.

[7] 47 C.F.R. § 1.405.

denial – while lacking in clarity – was a denial on the merits. Accordingly, the Commission has failed to comply with its own rules by not placing the petition on public notice and seeking public comment. It is well-settled that "'an agency's failure to follow its own regulations is fatal to the deviant action.'"[8] Because the petition was never put out for comment in the first place, the Commission should vacate its decision, promptly place CTIA's filing on public notice, and consider it *ab initio*.

II. ASSUMING *ARGUENDO* THE PETITION COULD BE RULED ON, THE FCC FAILED TO ARTICULATE WITH REASONABLE CLARITY THE BASIS FOR ITS DENIAL.

An agency must "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination."[9] In denying CTIA's petition to reallocate the entire 2 GHz MSS band, however, the FCC states simply that "[t]he actions we are taking in this *MO&O* and *FNPRM* better serve the public interest with respect to these issues, and are consistent with the International Bureau's recent action granting 2 GHz MSS authorizations."[10] This justification is insufficient, assuming the FCC could take action in the first place. Such vague, conclusory language fails to provide the clarity and precision

[8] *Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm'n*, 499 F.2d 1069, 1082 (D.C. Cir. 1974), *quoted in Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992).

[9] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Court of Appeals for the D.C. Circuit has specifically held that this fundamental principle of administrative law applies even where an agency has refused to institute a rulemaking. *See American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (noting that in cases where an agency has refused to institute a rulemaking, "we must consider whether the agency's decisionmaking was 'reasoned.'") (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983)).

[10] *Advanced Services FNPRM* at ¶ 23.

necessary "to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking."[11]

The Commission's mere recitation that its action best serves the public interest is insufficient because it fails to provide any indication of *why* denial is in the public interest. As the D.C. Circuit has previously held, "[a] simple invocation of 'the public interest,' without more, is an insufficient explanation . . . . The agency is obliged to provide a more reasoned, less inscrutable basis for its actions"[12] that indicates it took a "hard look" at the request.[13] The Commission's statement that denial of the CTIA petition is consistent with the Bureau's 2 GHz MSS license grants "crosses the line from 'the tolerably terse to the intolerably mute.'"[14] In sum, there is simply no discussion of the points made in the petition nor, of course, any discussion of the comments that should have been requested.[15] This was clear error.

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[11] *American Horse Protection Ass'n v. Lyng*, 812 F.2d at 6 (finding that the reasons given for refusal to institute a rulemaking were insufficient); *see WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969) ("[A]n agency must articulate with clarity and precision its findings and the reasons for its decisions."); *see generally Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[12] *Alegria I, Inc., v. FCC*, 905 F.2d 471, 474 (D.C. Cir. 1990) (citing *Moon v. United States Dep't of Labor*, 727 F.2d 1315, 1318 (D.C. Cir. 1984).

[13] *See Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977) (holding that an agency's decision that the public interest does not require promulgation of specific rules must be sustained "'if it . . . is blessed with an articulated justification that makes a 'rational connection between the facts found and the choice made,' and follows upon a 'hard look' by the agency at the relevant issues.'") (quoting *Greater Boston*, 444 F.2d at 851).

[14] *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (quoting *Greater Boston*, 444 F.2d at 851-52).

[15] *See State Farm*, 463 U.S. at 43; *Telocator Network of Am v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982) (noting that review of agency decisions, while narrow, is designed "'to insure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. *This includes the agency's addressing the significant comments made in the rulemaking proceeding*. . . .'") (emphasis added) (quoting *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982)).

III. ASSUMING *ARGUENDO* THE BUREAU'S LICENSING DECISIONS FORM THE BASIS FOR THE DENIAL BY THE COMMISSION, THE FCC FAILED TO ENGAGE IN REASONED DECISIONMAKING.

As mentioned, the only reference in the *Advanced Services Further Notice* is to the 2 GHz MSS licensing decisions. Those licensing decisions were issued by the Bureau, however, and should have been made only *after* full consideration of the CTIA petition. By deciding to license MSS carriers first, the Bureau prejudged the CTIA petition because most of the spectrum was awarded to licensees before CTIA's request to revisit the original allocation was considered. Moreover, the licensing decisions were predicated upon the public interest basis for the original 70 MHz allocation first announced in 1997 and reaffirmed in 2000 – service to rural and unserved areas – which subsequently was undermined by the statements of Motient and New ICO in March of 2001.

A. FCC Reliance on the Bureau's Licensing Decisions Is Unreasonable Because the CTIA Petition Raised Questions Requiring Resolution Before Licensing.

The licensing decisions by the Bureau hinged on proper consideration and resolution of CTIA's petition. CTIA's petition directly related to the amount of spectrum available for licensing. It called into question whether the original 70 MHz MSS allocation makes sense in light of a series of events that post-date the original allocation: (i) recent statements by MSS applicants that the industry as a whole is not viable; (ii) mounting evidence that the industry is financially troubled; and (iii) the demonstrated need for spectrum by terrestrial mobile sectors of the communications industry. By making licensing decisions that parsed out most of the spectrum at issue in CTIA's petition without first considering the merits of the petition, the Bureau has prejudged the outcome.[16] Such action was also inconsistent with the Commission's

[16] *Cf. Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (discussing the prejudicial effect of granting one mutually exclusive application while setting the other for hearing, as grant
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policy to ensure that spectrum is put to its "highest and best use,"[17] as several wireless carriers have demonstrated in their Application for Review of the licensing decisions. Thus, Commission reliance on the Bureau's licensing decisions amounted to unreasoned decisionmaking.

B. FCC Reliance on the Bureau's Licensing Decisions Is Unreasonable Because No Consideration Has Been Given Whether The Factual Predicate for the Original Allocation Has Been Undermined.

The licensing decisions by the Bureau also cross-reference prior public interest findings supporting the original MSS allocation. In particular, the 2 GHz MSS license grants were premised upon representations by 2 GHz MSS proponents that their systems would provide service to rural and unserved areas.[18] As CTIA's petition and a series of subsequent filings demonstrated,[19] however, this premise was highly questionable, yet has never been evaluated.

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of the former effectively nullifies consideration of the latter); *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 762 (D.C. Cir. 1960) (discussing the need for careful agency consideration and discussion before taking action in one proceeding that may prejudice the outcome of another).

[17] *See Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 F.C.C.R. 19868 (1999) ("*Spectrum Policy Statement*").

[18] *See, e.g., ICO Services Limited*, *Order*, DA 01-1635, at ¶ 31 (IB/OET rel. Jul. 17, 2001) (relying upon the "findings made by the Commission last year that 2 GHz MSS is in the public interest" in granting 2 GHz MSS applications) (citing *2 GHz MSS License Order*); *see also 2 GHz MSS License Order*, 15 F.C.C.R. 16127, ¶ 33 (2000) ("We remain committed to encouraging the expeditious delivery of telecommunications services, via satellite services, to unserved communities. The comments in this proceeding support our belief that satellites are an excellent technology for delivering these services. Indeed, the record shows that many of the 2 GHz MSS system proponents claim that providing service to unserved and rural areas is a major part of their business plans."); *id*. at ¶ 1 (finding that "2 GHz MSS systems will . . . promote development of regional and global communications to unserved communities in the United States, its territories and possessions, including rural and Native American areas, as well as worldwide.").

[19] *See, e.g.,* June 13, 2001 Joint Letter from AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint PCS, and Verizon Wireless; July 12, 2001 CTIA *ex parte* in IB Docket 99-

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Citing evidence that the MSS industry is financially troubled and recent statements by an applicant – New ICO – that MSS alone is not a viable business, CTIA specifically noted that the "reality of MSS[] . . . is far different from its promise." In particular, New ICO submitted evidence that MSS coverage limitations in urban areas and indoors are a "crippling impediment" to MSS systems that place in "dire jeopardy" the ability of MSS to deliver service, including service to rural and unserved areas.[20] These statements by New ICO, and related statements by another MSS operator, Motient,[21] directly called into question the primary predicate upon which 2 GHz MSS systems were found to be in the public interest – service to rural and unserved areas.[22] For that reason, CTIA petitioned the Commission to initiate a rulemaking to reallocate MSS spectrum to meet other competing spectrum needs.[23] Thus, substantial and material questions of fact were raised concerning whether the public interest would be served by granting applications for a service that applicants themselves acknowledged was not viable. The Commission itself supports this analysis when it asks in the *Flexible Use Notice* whether a CMRS-type terrestrial service will help make MSS viable.

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81 and ET Docket 00-258, appended to *ex parte* letter filed July 16, 2001; *see also* Application for Review; Reply to Oppositions to Application for Review (filed Sept. 13, 2001).

[20] *See generally* New ICO Global Communications (Holdings) Ltd. ("New ICO") *ex parte* letter dated March 8, 2001 ("New ICO *Ex Parte*").

[21] Motient Services Inc. ("Motient") and Mobile Satellite Ventures Subsidiary LLC, Application for Assignment of Licenses and for Authority to Launch and Operate a Next-Generation Mobile Satellite Service System, at iii (filed Mar. 1, 2001).

[22] *See id*. at 12-13; New ICO *Ex Parte* at 1, 5-6.

[23] There is unquestionably a need for more CMRS spectrum to serve commercial needs. *See, e.g., Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, *Notice of Proposed Rule Making and Order*, 16 F.C.C.R. 596, ¶ 2 (2001) (noting that "demand for spectrum has increased dramatically as a result of explosive growth in wireless communications") (citing *Spectrum Policy Statement*, *supra* note 17).

Accordingly, to the extent the Commission declined to initiate a rulemaking based upon its prior finding that MSS would serve the public interest, such a finding was not possible without first resolving the outstanding viability and competing use issues raised. The factual predicate of the original MSS allocation has been called into serious question, yet the Commission simply ignored that fact. The D.C. Circuit has previously held that although an agency has discretion to refuse to initiate a rulemaking, such refusal "sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises."[24] Here, a substantial and material question was raised as to whether 2 GHz MSS is viable at all, let alone in rural and unserved areas. As the Court has noted, "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject . . . has been removed."[25] Such is the case here. Because the public interest basis for allocating 2 GHz spectrum to MSS and upon which the applications were granted may no longer be valid, reliance upon the licensing decisions as a basis for denying CTIA's petition was not reasoned decisionmaking.

Finally, by ignoring these issues and moving ahead with licensing and the *Flexible Use* docket, the FCC did an end-run around the auction statute.[26] The FCC has taken the bulk of the spectrum off the auction table by not considering whether to reallocate it for other uses, such as CMRS, yet seeks comment on whether to allow MSS providers to provide CMRS-type terrestrial

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[24] *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987); *see also Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (per curiam) (ordering the FCC to reexamine whether regulations continued to serve the public interest long after the predicate for the regulations had ceased to exist); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (noting that the FCC cannot rely on procedural discretion to put off review of a rule or decision where the facts indicate there is no longer a foundation).

[25] *WWHT, Inc. v. FCC*, 656 F2d 807, 819 (D.C. Cir. 1981).

[26] *See* 47 U.S.C. § 309(j).

services over MSS spectrum to sustain their operations. Such an allowance would clearly subvert the purpose of the auction statute, which is to make spectrum available to those who most highly value it.[27]

CONCLUSION

In sum, CTIA's petition should have been given full consideration before the FCC proceeded with licensing and other rulemakings premised on the validity of the original MSS allocation rulemaking. Based on the foregoing, the Commission should reconsider its denial of CTIA's petition for rulemaking. Action in response to the *Advanced Services Further Notice* concerning 2 GHz MSS spectrum and the companion *Flexible Use Notice* is premature because it is predicated upon what the FCC decides here.

Respectfully submitted,

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[27] *See, e.g., Amendment of the Commission's Rules Regarding Multiple Address Systems*, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 F.C.C.R. 7973, 7997 (1997); *Implementation of Sections 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Ninth Report and Order*, 11 F.C.C.R. 14769, 14773 (1996).